In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 531

MARGIT SIGRAY BESSENYEY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

During the years in question, 1955 through 1959, petitioner incurred substantial and recurring losses in the breeding and raising of riding and carriage horses known as Hungarian Half-Breds. The question presented is whether an expectation of profits was petitioner's primary motive in engaging in this activity. If so, petitioner can deduct the losses sustained in her horse-breeding operation under Section 162, 165, or 212 of the Internal Revenue Code of 1954. The Tax Court upheld the Commissioner's determination that petitioner could not deduct these losses because, after consideration of the entire record, it

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concluded that her horse-breeding activities were for personal satisfaction and were not engendered by a profit motive. The court of appeals affirmed, concluding that its review of the record did not leave it "with a definite and firm conviction that a mistake has been committed." (R. 29a; Pet. App. B A3–A17.) [1]

The issue presented is one of fact. The decision below is correct and there is no conflict of decisions or other basis for review by this Court.

1. Petitioner cannot deduct the expenses or losses relating to her activities as a breeder of Hungarian Half-Bred horses unless these activities were engaged in for the primary purpose of making a profit. *Helvering* v. *Nat. Grocery Co.*, 304 U.S. 282, 289, n. 5; *Morton* v. *Commissioner*, 174 F. 2d 302, 303 (C.A. 2), certiorari denied, 338 U.S. 828; *White* v. *Commissioner*, 227 F. 2d 779, 780 (C.A. 6), certiorari denied, 351 U.S. 939; *Hirsch* v. *Commissioner*, 315 F. 2d 731, 736–737 (C.A. 9). Whether such an intention exists is a factual question to be determined by the trier of fact. *Coffey* v. *Commissioner*, 141 F. 2d 204 (C.A. 5); *Morton* v. *Commissioner*, *supra*. Here the Tax Court's finding that petitioner "did not in fact have a *bona fide* intention to conduct her activities for a profit" is entitled to finality, unless, as the court of appeals below correctly stated (Pet. App. B A13), the inferences made by the trial judge as to petitioner's profit motive are "clearly erroneous". E.g., *Commissioner* v. *Duberstein*, 363 U.S. 278; *United States* v. *Gypsum Co.*, 333 U.S. 364.

[1] "R." references are to the taxpayer's appendix in the court of appeals.

During the years in issue, petitioner incurred total losses over $124,000, while during the following three years her losses exceeded $202,000 (Pet. App. B A4, n. 2).[2] Petitioner's first sale of a horse did not occur until late in 1964, more than a decade after the commencement of the enterprise (R. 20a). She professed indifference to her losses, and testified that she was importantly motivated by a desire to preserve this particular breed of horse (R. 28a). In holding on this record that petitioner's motive was not profit, the Tax Court did not, as petitioner contends (Pet. 13-17), establish a special rule for a wealthy taxpayer who was providing risk capital to a speculative or novel venture; what the court did was to recognize that the manner in which the farms were operated, when viewed in light of petitioner's personal wealth, justified the conclusion that profit was not her motive (R. 29). The conclusion reached by the courts below that petitioner's horse-breeding operation was not engenered by a profit motive is thus clearly factual in nature, amply supported by the evidence, and is inappropriate for further review here. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214; *Rudolph* v. *United States*, 370 U.S. 269, 271.

[2] Petitioner received $129,587 in dividends and $18,743 in tax exempt income in 1956; the corresponding figures for 1959 were $139,504 and $10,417 (Pet. App. B, A7). Gross income from sales of tobacco and hay from the two farms of petitioner (one in Montana and one in Maryland) ranged from a low of $683 in 1958 to a high of $4,084 in 1959 (Pet. App. B A6). Her expenditures on the farms ranged from $6,027.80 to $75,549.12 during the period (R. 24a).

2. Petitioner contends that the standards of appellate review set forth in *Commissioner* v. *Duberstein, supra,* and followed by the court of appeals should not be applicable to the instant case because predictability of the tax treatment of expenditures is necessary (Pet. 17–20). Rather, petitioner urges adoption of an objective test of what constitutes a "trade or business" based upon whether the particular enterprise is conducted "in a business-like way" (Pet. 23–25). This argument ignores the definition of the term "trade or business" given by this Court in *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 171, as "that which occupies the time, attention and labor of men *for the purpose of a livelihood or profit.*" [Emphasis supplied.] The existence of a profit motive is thus an integral part of the definition of "trade or business" and necessarily involves a subjective inquiry. *Duberstein* involved such an inquiry, which "must be based ultimately on the application of the fact-finding tribunal's experience with the mainspring of human conduct to the totality of the facts of each case." (363 U.S. 278, 289). Such considerations must apply to the determination of a taxpayer's desire for profit just as they did in *Duberstein* to a determination of a transferor's intent. *Austin* v. *Commissioner*, 298 F. 2d 583 (C.A. 2); *Imbesi* v. *Commissioner*, 361 F. 2d 643 (C.A. 3); *Schley* v. *Commissioner*, 375 F. 2d 747 (C.A. 2). That some cases in this area are won by taxpayers, and others by the Commissioner, proves only

that the outcome of this type of litigation hinges upon the particular facts involved.[3]

3. Petitioner incorrectly argues that her losses only appeared substantial because of her use of the special tax rules for farmers in Treasury Regulations on Income Tax (1954 Code), Section 1.162–12 (Pet. 20–23). This regulation entitles a taxpayer who operates a farm for profit to deduct costs that would ordinarily be capitalized and depreciated. To begin with, the courts below clearly did not hold that the amount of the losses alone indicated the lack of a profit motive. On the contrary, the Tax Court observed that a profit motive "may in fact exist even in the face of a history of losses unaccompanied by any gains whatever * * *" (R. 26a). In no event should petitioner be heard to complain of the consequences of the use of an accounting method that she herself voluntarily chose in computing the farm losses that she sought to deduct from her other income.

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[3] Petitioner implies (Pet. 16) that the decision below employed a standard differing from that of *Doggett* v. *Burnet*, 65 F. 2d 191 (C.A. D.C.), but the portion of the *Doggett* opinion quoted by petitioner (Pet. 16), is plainly not in conflict with the holding below. In addition, the District of Columbia Circuit cited with approval (p. 193) Judge Learned Hand's statement in *Thacher* v. *Lowe*, 288 Fed. 994 (S.D. N.Y.), that "The test to me appears to be only of his actual intention." See also *Chaloner* v. *Helvering*, 69 F. 2d 571 (C.A. D.C.).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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